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# Human Rights or Environmental Rights? A Reassessment

Alan Boyle\*

## 1. Introduction

Environmental rights do not fit neatly into any single category or "generation" of human rights. They can be viewed from at least three perspectives, straddling all the various categories or generations of human rights. First, existing civil and political rights can be used to give individuals, groups and nongovernmental organizations (NGOs) access to environmental information, judicial remedies and political processes. On this view their role is one of empowerment: facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm. A second possibility is to treat a decent, healthy or sound environment as an economic or social right, comparable to those whose progressive attainment is promoted by the 1966 United Nations (UN) Covenant on Economic Social and Cultural Rights. The main argument for this approach is that it would privilege environmental quality as a value, giving it comparable status to other economic and social rights, such as development, and priority over non rights-based objectives. Like other economic and social rights, it would be programmatic and in most cases enforceable only through relatively weak international supervisory mechanisms. The third option would treat environmental quality as a collective or solidarity right, giving communities ("peoples") rather than individuals a right to determine how their environment and natural resources should be protected and managed.

The first approach is essentially anthropocentric insofar as it focuses on the harmful impact on individual humans rather than on the environment itself: it amounts to a

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“greening” of human rights law, rather than a law of environmental rights. The second comes closer to seeing the environment as a good in its own right but, nevertheless one that will always be vulnerable to tradeoffs against other similarly privileged but competing objectives, including the right to economic development.<sup>1</sup> The third approach is the most contested. Not all human rights lawyers favor the recognition of third generation rights, arguing that they devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic and social rights fully.<sup>2</sup> The concept hardly featured in the agenda of the 1993 UN World Conference on Human Rights, and in general it adds little to an understanding of the nature of environmental rights, which are not inherently collective in character. However, there are some significant examples of collective rights that in certain contexts can have environmental implications, such as the protection of minority cultures and indigenous peoples,<sup>3</sup> or the right of all peoples to freely dispose of their natural resources, which was recognised in the 1966 U.N. Covenants on Civil and Political Rights and Economic, Social and Cultural Rights,<sup>4</sup> and in the 1981 African Charter on Human and Peoples Rights.<sup>5</sup>

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<sup>1</sup> Declaration on the Right to Development, UNGA Res. 41/128 (1986), Article 2(3); Rio Declaration on Environment and Development, Principle 3, U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992) [hereinafter Rio Declaration]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1(1), U.N. Doc. A/6316 (Mar. 23, 1976). The “right to development” embraces not just the promotion of economic development by states but also the broader human development elements found in the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966); the 1993 Vienna Declaration on Human Rights, and the Millennium Development Goals, UNGA Res. 55/2 (2000). See generally A. Rosas, *The Right to Development*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 119-21 (A. Eide et al. eds., 2001); DEVELOPMENT AS A HUMAN RIGHT (B.A. Andreassen and S.P. Marks eds., 2006); J. Merrills, *Environmental Rights*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 663 (D. Bodansky, J. Brunnée and E. Hey eds., 2007).

<sup>2</sup> See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984); I. Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES (James Crawford ed., 1988).

<sup>3</sup> See International Covenant on Civil and Political Rights, *supra* note 1, art. 27 (stating that minorities have the right to enjoy their own culture); *id.* at art. 47 (stating that they may exploit their natural resources). See generally Int’l Lab. Org., *Convention Concerning Indigenous and Tribal Peoples in Indep. Countries*, No. 169 (Sept. 5, 1991).

<sup>4</sup> International Covenant on Civil and Political Rights, *supra* note 1, at art. 1(2); See also International Covenant on Economic, Social, and Cultural Rights, *supra* note 1, at art. 25; International Covenant on Civil and Political Rights, *supra* note 1, art. 47 (“Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.”). For drafting history of Article 1(2), see A. Cassese, *The Self-determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS – THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed., 1981); A. Rosas, *supra* note 1 (notes that Article 1 “establishes minimum rules for the right of the entire population to economic and social rights against its own government.”).

<sup>5</sup> African Charter on Human and Peoples’ Rights, art. 21, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (June 27, 1981).

Put simply, the question addressed in this paper is the following: should we continue to think about human rights and the environment within the existing framework of human rights law in which the protection of humans is the central focus – essentially a greening of the rights to life, private life, and property – or has the time come to talk directly about environmental rights- in other words a right to have the environment itself protected? Should we transcend the anthropocentric in favor of the eco-centric?

The question is not a new one. Thirty-five years ago at the United Nations Conference on the Human Environment held in Stockholm, the international community declared “[m]an has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>6</sup> This grand statement might have provided the basis for subsequent elaboration of a human right to environmental quality,<sup>7</sup> but its real-world impact has been noticeably modest. It was not repeated in the 1992 Rio Declaration, which makes human beings “the central concern of sustainable development” and refers only to their being “entitled to a healthy and productive life in harmony with nature.”<sup>8</sup> As Dinah Shelton noted at the time, the Rio Declaration's failure to give greater emphasis to human rights was indicative of uncertainty and debate about the proper place of human rights law in the development of international environmental law.<sup>9</sup> Fifteen years later there is still room for debate.

Among human rights treaties only the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the “best attainable standard of health”<sup>10</sup> and their right to “a general satisfactory environment favorable to their development.”<sup>11</sup> In the *Ogoniland* case the African Commission on Human and Peoples Rights concluded that ‘an environment degraded by pollution and defaced by the destruction of all beauty and

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<sup>6</sup> Stockholm Dec'l on the Human Env't, Princ. 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972); see Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 451-54 (1973).

<sup>7</sup> See Sohn, *supra* note 6 (arguing that Principle 1 of the Stockholm Declaration creates this kind of individual human right).

<sup>8</sup> Rio Declaration, *supra* note 1, at Principle 1.

<sup>9</sup> Dinah L. Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. OF INT'L ENV. L. 75, 82 (1992).

<sup>10</sup> African Charter on Human and Peoples' Rights, *supra* note 5, at art. 16.

<sup>11</sup> *Id.* at art. 24.

variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health'.<sup>12</sup> It held, *inter alia*, that Article 24 of the Charter imposes an obligation on the State to take reasonable measures "to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources."<sup>13</sup> Specific actions required of States in fulfilment of Articles 16 and 24 include 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.'<sup>14</sup> The Commission's final order is also the most far-reaching of any environmental rights case. It calls for a 'comprehensive cleanup of lands and rivers damaged by oil operations,' the preparation of environmental and social impact assessments, and provision of information on health and environmental risks and 'meaningful access to regulatory and decision-making bodies.'<sup>15</sup> As Shelton observes, 'The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights.'<sup>16</sup>

*Ogoniland* is a remarkable decision that goes further than any other in the substantive environmental obligations it places on states. It is unique in applying for the first time the right of peoples to dispose freely of their own natural resources.<sup>17</sup> When combined with the evidence of severe harm to the lives, health, property and well-

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<sup>12</sup> Para. 51. See K.S.A. Ebeku, *The right to a satisfactory environment and the African Commission*, 3 AFRICAN HUMAN RIGHTS LAW JOURNAL 149 (2003) at 163; J.C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter*, 1 AFRICAN JOURNAL OF LEGAL STUDIES 129 (2005) at 139.

<sup>13</sup> Soc. and Econ. Rights Action Ctr. v. Nigeria, OAU Doc. CAB/LEG/67/3 rev. 5, ¶¶ 52-53, available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>; see generally Dinah L. Shelton, *Decision Regarding Communication 155/96 (Soc. and Econ. Rights Action Ctr./Ctr. for Econ. and Soc. Rights v. Nigeria)*, Case No. ACHPR/COMM/A044/1, 96 AM. J. INT'L L. 937 (2002).

<sup>14</sup> Soc. And Econ. Rights Action Ctr., OAU Doc. CAB/LEG/67/3 rev. 5, at ¶ 54.

<sup>15</sup> *Id.* at ¶ 69.

<sup>16</sup> Shelton, *supra* note 13, at 942.

<sup>17</sup> *But see* Int'l Covenant on Civil and Political Rights, *supra* note 1, at art. 1 ("All peoples may, for their own ends, freely dispose of their natural wealth and resources . . ."). However, Article 1 is not justiciable by the Human Rights Commission under the procedure for individual complaints laid down in the Optional Protocol. See *Lubicon Lake Band v. Canada*, Commc'n 167/1984, ¶ 32.1, U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

being of the local population, the decision can be seen as a challenge to the sustainability of oil extraction in Ogoniland. The most obvious characteristics of unsustainable development include material harm and a lack of material benefits for those most adversely affected. In that sense it is not surprising that the African Commission does not see this case simply as a failure to maintain a fair balance between public good and private rights. This decision gives some indication of how environmental rights could be used, but its exceptional basis in Articles 21 and 24 has to be remembered. No other treaty contains anything directly comparable. Moreover, the rights created by the African Convention are peoples' rights, not individual rights.

However, in somewhat similar circumstances, the Inter-American Commission and Court of Human Rights have interpreted the rights to life, health and property afford protection from environmental destruction and unsustainable development and they go some way towards achieving the same outcome as Article 24 of the African Convention.<sup>18</sup> In the *Maya Indigenous Community of Toledo Case*,<sup>19</sup> the Inter American Commission ('IACHR') accepted that logging concessions threatened long-term and irreversible damage to the natural environment on which the petitioners' system of subsistence agriculture depended. Loss of topsoil would prevent forest regeneration, damaging water supplies, and diminishing the availability of wildlife and plants. Citing *Ogoniland*, the IACHR concluded that there had been violations of the petitioners' right to property in their ancestral land. Its final order required Belize to repair the environmental damage and to take measures to demarcate and protect their land in consultation with the community. The Commission's decision notes the importance of economic development but reiterates that 'development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon

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<sup>18</sup> See *Mayagna (Sumo) Awas Tingni Cmty. V. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 (2004). Several other claims have been held admissible, including *Yakye Axa Indigenous Cmty. of the Enxet-Lengua People v. Paraguay*, Case 12.313, Inter-Am C.H.R., Report No. 2/02, Doc. 5 rev. 1 at 387 (2002), and *Kichwa Peoples of the Sarayaku Cmty. & Its Members v. Ecuador*, Case 167/03, Inter-Am. C.H.R., Report No. 62/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 308 (2004).

<sup>19</sup> *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, IACHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

which they depend for their physical, cultural and spiritual well-being.<sup>20</sup> Unlike the *Ogoniland* case, however, these IACHR decisions draw heavily on the particular rights of indigenous peoples to their traditional lands, and it is unclear whether they have more general relevance outside that context.

Most human rights treaties either make no explicit reference to the environment at all – such as the European Convention on Human Rights<sup>21</sup> – or they do so only in relatively narrow terms focused on human health,<sup>22</sup> and it is doubtful whether the latter agreements add anything to the case law derived from the right to life.<sup>23</sup> There is one notable exception: the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>24</sup> whose preamble not only recalls Principle 1 of the Stockholm Declaration and recognizes that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”<sup>25</sup> but also asserts that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>26</sup>

However, the focus of the Aarhus Convention is strictly procedural in content, limited to public participation in environmental decision-making, access to justice and

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<sup>20</sup> See e.g., International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), Art. 12 (Dec. 16, 1966); European Social Charter art. 11, Oct. 18, 1961, E.T.S. No. 035, 529 U.N.T.S. 89 (1961); Additional Protocol to the American Convention on Human Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp., U.N. Doc. A/44/49 (Nov. 20, 1989). For fuller discussion of these treaty provisions, see Robin Churchill, *Environmental Rights in Existing Human Rights Treaties*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION ch. 5 (Alan E. Boyle & Michael R. Anderson eds., 1996).

<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter European Convention on Human Rights).

<sup>22</sup> See, e.g., International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), Art. 12 (Dec. 16, 1966); European Social Charter art. 11, Oct. 18, 1961, E.T.S. No. 035, 529 U.N.T.S. 89 (1961); Additional Protocol to the American Convention on Human Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp., U.N. Doc. A/44/49 (Nov. 20, 1989); See also Robin Churchill, *Environmental Rights in Existing Human Rights Treaties*, in Boyle & Anderson, *supra* note 20, at 89-108.

<sup>23</sup> See *infra*, section 3.

<sup>24</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, UN Doc. ECE/CEP/43, 38 I.L.M. 517 [hereinafter Aarhus Convention].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

information.<sup>27</sup> As a conception of environmental rights, it owes little to Stockholm Principle 1 and everything to Principle 10 of the 1992 Rio Declaration, which gives explicit support in mandatory language to the same category of procedural rights.<sup>28</sup> The Aarhus Convention is widely ratified in Europe and has had significant influence on the jurisprudence of the European Court of Human Rights, whose decisions are considered below. The Aarhus Convention is important in the present debate because, unlike the ECHR, it gives particular emphasis to public interest activism by NGOs.<sup>29</sup> Moreover, it also applies, with some important qualifications, to plans, policies and legislation. Ultimately, it is public participation at this level, rather than at the project level to which Article 6 applies, that has the greatest potential to promote environmental protection.<sup>30</sup> But as one critic has pointed out, while the Convention endorses the right to live in an adequate environment, it “stops short, however, of providing the means for citizens directly to invoke this right.”<sup>31</sup>

If Stockholm did little for the development of international environmental rights, it may have had greater impact on national law. Environmental provisions of some kind have been added to an increasing number of constitutions since 1972. Some clearly create no rights of any kind. For example, Article 37 of the European Union’s Charter of Fundamental Rights merely provides that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of

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<sup>27</sup> See J. Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. OF INT’L ENV. L. 51 (1997).

<sup>28</sup> Rio Declaration, *supra* note 1. Principle 10 provides that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” See also United Nations Conference on Environment and Development, June 3-14, 1992, *Agenda 21*, ch. 23.2. U.N. Doc. A/CONF.151/26 (June 14, 1992).

<sup>29</sup> Aarhus Convention, *supra* note 24, at art. 4(1)(a), 6 and 9. Article 6 is amended by Decision II/1 of the United Nations Economic Commission for Europe, *Report of the Second Meeting of the Parties*, ECE/MP.PP/2005/2/Add.2 (May 27, 2005) (Genetically Modified Organisms).

<sup>30</sup> See arts. 7 and 8. Despite its ‘soft’ wording (‘endeavour to provide opportunities for public participation...’) the Compliance Committee has found at least one state in breach of art.7: *Dalma Orchards - Findings and Recommendations with regard to compliance by Armenia* (Comm.ACCC/C/2004/08) U.N. Doc. ECE/MP.PP/C.1/2006/2/Add.1 (10 May 2006). See also *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, U.N. Doc. ECE/MP.EIA/2003/2 (May 21, 2003).

<sup>31</sup> TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 180 (2005).



sustainable development.”<sup>32</sup> Similarly, under the heading “Directive Principles of State Policy,” Article 48A of the Indian Constitution provides only that “The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”<sup>33</sup> This article obviously creates no enforceable rights but, unlike the EU Charter, it has encouraged Indian courts to give other human rights, including the right to life, a very vigorous environmental interpretation.<sup>34</sup> The result has been a jurisprudence, which, more than in any other country, uses human rights law to address questions of environmental quality.<sup>35</sup> Some constitutions draw inspiration from Article 12 of the 1966 UN Covenant on Economic, Social and Cultural Rights. Thus, Article 35 of the Constitution of the Republic of Korea declares that “[a]ll citizens shall have the right to a healthy and pleasant environment,” but it then goes on to say that the substance of this right shall be determined by legislation.<sup>36</sup> This need not stop Korean courts from “greening” other human rights, however.

Other constitutions give the environment a stronger human rights focus. Article 45 of the Spanish Constitution declares that everyone has “the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.”<sup>37</sup> It then directs public authorities to concern themselves with “the rational use of

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<sup>32</sup> Pavlos Eleftheriadis, *The Future of Environmental Rights in the European Union*, in THE EUROPEAN UNION AND HUMAN RIGHTS 531-549 (Philip Alston ed., 1999).

<sup>33</sup> INDIA CONST. art. 48A. See also CONSTITUTION OF THE P.R.OF CHINA, art. 9 (1982) (“The state ensures the rational use of natural resources and protects rare animals and plants. Appropriation or damaging of natural resources by any organization or individual by whatever means is prohibited.”); and art. 26 (“The state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests.”).

<sup>34</sup> See INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS 150-1 (Michael Anderson & Paolo Galizzi eds., 2002) (on the use of “directive principles” in Indian case law).

<sup>35</sup> See *Bandhua Mukti Morcha v. Union of India* 3 S.C.C. 161 (1984); *M.C Mehta v. Union of India* 2 SCC 353 (1997); *Jagganath v. Union of India* 2 S.C.C. 87 (1997). In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529, the Supreme Court declared “[t]he right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.” For a recent overview of all the Indian case law, see Jona Razzaque, *Human Rights and the Environment: The National Experience in South Asia and Africa*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment: Background Paper No. 4, 14-16 (January 2002).

<sup>36</sup> Constitution of the Republic of Korea, art. 35.

<sup>37</sup> Spanish Constitution, art. 45.

all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment...<sup>38</sup> Article 225 of the Brazilian Constitution declares that “[e]veryone has the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve [it] for present and future generations.”<sup>39</sup> It then sets out in some detail the principal environmental responsibilities of the state.<sup>40</sup> Article 56 of the Turkish Constitution is similar: “Everyone has the right to live in a healthy, balanced environment. It [shall be] the duty of the [S]tate and the citizens to improve [and preserve] the natural environment . . . and to prevent environmental pollution.”<sup>41</sup> Article 42 of the 1993 Russian Constitution confers on everyone “the right to a favourable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations.”<sup>42</sup> The 1996 South African Constitution gives everyone the right “to an environment that is not harmful to their health or well-being; and to have the environment protected, for

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<sup>38</sup> *Id.*

<sup>39</sup> Brazilian Federal Constitution, art. 225. This is not just a collective right; an individual can also bring an environmental claim. *See id.* at art. 5 (“[a]ny citizen is a legitimate party to file a people’s legal action with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment and to the historic and cultural heritage....”).

<sup>40</sup> *Id.*, art. 225. Including, inter alia, the following:

Paragraph 1 - In order to ensure the effectiveness of this right, it is incumbent upon the Government to:  
I - preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems;

II - preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material;

III - define, in all units of the Federation, territorial spaces and their components which are to receive special protection. any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden;

IV - require, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public;

V - control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment;

VI - promote environment education in all school levels and public awareness of the need to preserve the environment;

VII - protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.

...

Paragraph 4 - The Brazilian Amazonian Forest, the Atlantic Forest, the Serra do Mar, the Pantanal Mato-Grossense and the coastal zone are part of the national patrimony, and they shall be used, as provided by law, under conditions which ensure the preservation of the environment, therein included the use of mineral resources.

<sup>41</sup> Turkish Constitution, art. 56 ; *See also* Taskin v. Turkey, 2004-X Eur. Ct. H.R. 50.

<sup>42</sup> Constitution of the Russian Federation, art. 42.

the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>43</sup> This provision reflects Article 24 of the African Convention, and the *Ogoniland* decision gives some guidance on how it might be interpreted and applied.<sup>44</sup>

Some of these constitutions, including those of India, Korea, and the EU, address the responsibilities of government without necessarily creating justiciable environmental rights, although they may nevertheless influence the interpretation and application of other constitutional rights or of general law. They do not appear to create an autonomous right to an environment of any particular quality, although they plainly place a responsibility on government to protect the environment. In other cases, a stronger rights-based interpretation is possible, and the important question is the scope and extent of the protection afforded to the environment. The Spanish, Brazilian, Turkish, Russian and South African constitutional provisions suggest that in those jurisdictions there is some form of right to environmental quality along the lines foreseen at Stockholm, although much will depend on how national courts interpret and use them. Many other national legal systems that lack comparable constitutional provisions nevertheless allow quite liberal use of public interest litigation and judicial review in environmental cases.<sup>45</sup> This is particularly true of common law countries such as the USA, UK, Canada, Australia and India. As noted above, it is also a trend encouraged by the Aarhus Convention.<sup>46</sup> Stockholm Principle 1 may thus have had a broader influence on national law than a survey of constitutions alone would suggest.

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<sup>43</sup> S. AFR. CONST. 1996 art. 24.

<sup>44</sup> See Soc. And Econ. Rights Action Ctr., OAU Doc. CAB/LEG/67/3 rev. 5.

<sup>45</sup> See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 520 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Sierra Club v. Morton*, 405 U.S. 727 (1972); J.G. Miller, *Case Law Analysis: The Standing of Citizens to enforce against violations of environmental statutes in the United States*, 12 J. ENV. L. 370 (2000). On New Zealand, see *Envtl. Def. Soc’y v. S. Pac. Aluminium*, [1981] 1 N.Z.L.R. 146 (C.A.). On India, see *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, 1985 A.I.R. S.C. 652; *T. Damodhar Rao v. Mun. Corp. of Hyderabad*, 1987 A.I.R. S.C. 171; *M.C.Mehta v. Union of India*, 1987 1 S.C.C. 395. On Pakistan, see *Shehla Zia v. WAPDA*, P.L.D. 1994 S.C. 416. On Bangladesh, see *Farooque v. Bangladesh* 49 D.L.R. (A.D.) 1 (1997). On the Philippines, see *Minors Oposa v. Sec’y of the Dep’t of Env’t and Natural Res.*, 33 I.L.M. 173 (1994). On the Netherlands, see *Vereniging Milieudefensie v. Hoofdingenieur - Directeur van de Rijkswaterstaat*, 11 Neths. Y.B.I.L. 318 (1980).

<sup>46</sup> Aarhus Convention, *supra* note 24.

Partly in response to these national developments, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994 proposed a Declaration of Principles on Human Rights and the Environment.<sup>47</sup> This draft declaration offered a conception of human rights and the environment much closer to Principle 1 of the 1972 Stockholm Declaration than to Principle 1 of the 1992 Rio Declaration. It proclaimed generally that “[a]ll persons [have the right to] a secure, healthy and ecologically sound environment [and to] an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.”<sup>48</sup> This right would include, *inter alia*, freedom from pollution, environmental degradation and activities that adversely affect the environment or sustainable development; protection and preservation of the air, soil, water, biological diversity and ecosystems; ecologically sound access to nature; the conservation and sustainable use of nature and natural resources; preservation of unique sites; enjoyment of traditional life and subsistence for indigenous peoples. The UN Sub-Commission report stressed the close link between the right to a decent environment and the right to development, but it also relies on the indivisibility and interdependence of all human rights. This extensive and sophisticated restatement of environmental rights and obligations at the international level was based on a survey of national and international human rights law and international environmental law. The special rapporteur's most fundamental conclusion was that there had been “a shift from environmental law to the right to a healthy and decent environment.”<sup>49</sup>

The main arguments the Sub-commission advanced for adopting an autonomous right to a healthy and decent environment are the enhanced status it would give environmental quality when balanced against competing objectives, and that it would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights.<sup>50</sup> Their report

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<sup>47</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. Of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, 59, U.N. Doc. E/CN.4/Sub.2/1994/9, (July 6, 1994) [hereinafter *Human Rights and the Environment*]. For previous reports, see U.N. Doc. E/CN.4/Sub.2/1991/8; U.N. Doc. E/CN.4/Sub.2/1992/7, and U.N. Doc.E/CN.4/Sub.2/1993/7. Boyle & Anderson, *supra* note 20, at 67-69.

<sup>48</sup> *Human Rights and the Environment*, *supra* note 47, at part I(4).

<sup>49</sup> *Id.* at ¶ 22.

<sup>50</sup> See Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 35 (Sept. 25) (also printed in 37 I.L.M. 162) (separate opinion of Judge Weeramantry); Raghunandan S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in ENVIRONMENTAL CHANGE AND

stresses the close link between the right to a decent environment and the right to development, but it also relies on the indivisibility and interdependence of all human rights.

The response of the Human Rights Commission and of states generally was not favourable to this approach, and the proposal has made no further progress. US and European opposition has been particularly strong. In an earlier paper published in 1996,<sup>51</sup> I argued that the elaboration of an international right to a decent environment was undesirable on three grounds: that it was too uncertain a concept to be of normative value, that it was inherently anthropocentric, and that it was unnecessary given the extent to which international law already addressed environmental problems. Other scholars have taken a similar view.<sup>52</sup> Günther Handl argues that it is misconceived to assume that environmental protection is furthered by postulating a generic human right to the environment, in whatever form.<sup>53</sup> He notes the difficulty of definition, the inefficiency of developing environmental standards in response to individual complaints, the inappropriateness of human rights bodies for the task of supervising obligations of environmental protection, and the fundamentally anthropocentric character of viewing environmental issues through a human rights focus, entailing a form of “species chauvinism.” In this paper I do not propose to revisit each of these arguments, but I will review the development of the law since 1996 in order to see what conclusions we might reach on the question of environmental rights today.

Two developments stand out. First, there is now a substantial case law on the greening of existing human rights – especially in Europe but also in Africa and Latin America. Second, rights of access to information, public participation in decision-making, and access to justice in environmental matters have been significantly strengthened by Principle 10 of the Rio Declaration, by the 1998 Aarhus Convention, and by judicial decisions, the effect of which is to incorporate the requirements of Principle 10 into

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INTERNATIONAL LAW (Edith Brown Weiss ed., 1993); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

<sup>51</sup> Boyle & Anderson, *supra* note 20, at ch. 3.

<sup>52</sup> See, e.g., THE RIGHT TO HEALTH AS A HUMAN RIGHT 91-92 (Pierre-Marie Dupuy ed., 1979); Phillip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

<sup>53</sup> Günther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117 (Antonio Trindade ed., 1992).

existing human rights law. What matters is whether these developments have merely narrowed the gap, or is there essentially no room left for the autonomous environmental rights advocated by the UN Sub-Commission in 1994?

## 2. An Assessment of the Case Law

What follows will concentrate on Europe, simply because that is where most of the cases on human rights and the environment have been decided. An important question considered later is whether these European developments are also indicative of how other treaties with similar provisions should be interpreted, including the 1966 UN Covenant on Civil and Political Rights.

The European Convention on Human Rights, adopted in 1950, says nothing about the environment. It is however a “living instrument,” pursuant to which changing social values can be reflected in the jurisprudence. The European Court of Human Rights has consistently held that “the Convention . . . must be interpreted in the light of present-day conditions.”<sup>54</sup> With regard to environmental rights this is exactly what the Court has done. So extensive is its growing environmental jurisprudence that proposals for the adoption of an environmental protocol have not been pursued.<sup>55</sup> Instead, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 recapitulates the Court’s decisions on this subject and sets out some general principles.<sup>56</sup>

The Manual points out that “The Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a

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<sup>54</sup> Soering v United Kingdom, 11 Eur. Ct. H.R. 439, 473 (1989); See, e.g., Öcalan v. Turkey, 37 Eur. Ct. H.R. 10 (2003) (“capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer acceptable under Art. 2”). The Inter-American Court of Human Rights takes the same approach in interpreting the San Jose Convention. See Advisory Opinion on the Right to Information on Consular Assistance, 1999 Inter-Am C.H.R. (ser. A) No. 16 ¶¶ 114-5; Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man, 1989 Inter-Am. C.H.R. (ser. A) No. 10 ¶ 43; Mayagna (Sumo) Awas Tingni Cmty. v Nicaragua, 2001 Inter-Am. C.H.R. (ser. C) No. 20 ¶¶ 146-148.

<sup>55</sup> See Eur. Consult. Ass. Comm. of Experts for the Dev. of Human Rights, Doc. No. DH-DEV (2005) [hereinafter *Council of Europe Report*].

<sup>56</sup> *Id.* at Appendix II. See also Loukis Loucaides, *Environmental Protection through the Jurisprudence of the European Convention on Human Rights*, 75 BRIT. Y.B. INT’L L. 249 (2005); Richard Desgagné, *Integrating Environmental Values into the European Convention of Human Rights*, 89 AM. J. INT’L L. 263 (1995). For a recent review of other international developments see Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, 32 ENVTL. POL. & L. 158 (2002).

sound, quiet and healthy environment.”<sup>57</sup> Nevertheless, various articles indirectly have an impact on claims relating to the environment, most notably the right to life,<sup>58</sup> the right to respect for private and family life,<sup>59</sup> the right to peaceful enjoyment of possessions and property,<sup>60</sup> and the right to a fair hearing.<sup>61</sup> The Manual makes several points of general importance concerning the Convention’s implications for environmental protection. They can be summarized as follows:

1. The state has an obligation to regulate and control environmental problems where they impair the exercise of convention rights and to ensure that the law is enforced.
2. The state also has an obligation to make available information concerning serious environmental risks, and to make provision for participation in environmental decision-making and access to justice in environmental cases.
3. Protection of the environment is a legitimate objective that in appropriate cases can justify limiting certain rights, including the right to private life and the right to possessions and property. When balancing environmental concerns against convention rights, “[t]he Court has recognized that national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion . . . .”<sup>62</sup>
4. An unsettled question not referred to in the manual is whether Convention rights have trans-boundary application in environmental cases.

Let me examine each of these points before returning to the question of environmental rights per se.

## 2.1 *Regulation and control of environmental problems and law enforcement*

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<sup>57</sup> See *Council of Europe Report*, *supra* note 55.

<sup>58</sup> See European Convention on Human Rights, *supra* note 21, at § I, art. 2.

<sup>59</sup> *Id.* at art. 8.

<sup>60</sup> *Id.* at Protocol 1, art. 1.

<sup>61</sup> *Id.* at art. 6.

<sup>62</sup> See *Council of Europe Report*, *supra* note 55, at 10.

The starting point for any discussion of human rights and the environment is that a failure by the state to regulate or control environmental nuisances or to protect the environment may interfere with individual rights. Cases such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin* and *Fadeyeva* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose information.<sup>63</sup> All these cases have common features. First, there is an industrial nuisance – a chemical plant, smelter, tannery, mine or waste disposal site, for example. Secondly, there is a failure to take adequate preventive measures to control these known sources of serious risk to life, health, private life or property. The European Convention may not directly require states to protect the environment, but the Court’s decisions do require them to protect anyone whose rights are or may be seriously affected by environmental nuisances. As the Court said in *Fadeyeva*, the state’s responsibility in environmental cases “may arise from a failure to regulate private industry.”<sup>64</sup> The state thus has a duty “to take reasonable and appropriate measures” to secure rights under the convention. In *Öneryildiz* it emphasized that “[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”<sup>65</sup> The Court had no doubt that this obligation covered the licensing, setting up, operation, security and supervision of dangerous activities, and required all those concerned to take “practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”<sup>66</sup> These practical measures include law enforcement: it is a characteristic feature of *Guerra*, *Lopez Ostra*, *Taskin* and *Fadeyeva* that the industrial activities in question were either operating illegally or in violation of environmental laws and emissions standards. In *Lopez Ostra* and *Taskin* the national courts had ordered the closure of the facility in question, but their decisions had been ignored or

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<sup>63</sup> *Lopez Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1994); *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998); *Fadeyeva v. Russia*, 2005 IV 45 Eur. Ct. H.R. 10; *Öneryildiz v. Turkey*, 2004 XII 41 Eur. Ct. H.R. 20; *Taskin v. Turkey*, 42 Eur. Ct. H.R. 50.

<sup>64</sup> *Fadeyeva*, 2005 IV 45 Eur. Ct. H.R. 10.

<sup>65</sup> *Öneryildiz*, 2004 XII 41 Eur. Ct. H.R. 20, 359.

<sup>66</sup> *Id.* For a comparable case under the Inter American Convention in which precautionary measures were ordered by the Inter American Commission, see *Cmty. of San Mateo de Huanchur v. Peru*, Case 504/03, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 487 (2004). See also *Maria Estela Acosta Hernandez v. Mexico*, Case 11.823, Inter-Am. C.H.R., Report No. 17/03, OEA/Ser.L/V/II.118 doc. 70 rev. 2 at 514 (2003) (holding a similar complaint to be inadmissible for delay).



overruled by the political authorities. In effect, there is in these cases a right to have the law enforced and the judgments of national courts upheld:

“The Court would emphasise that the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.”<sup>67</sup>

We can draw certain obvious conclusions from these cases. First, states have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health or the enjoyment of private life or property.<sup>68</sup> This is not simply a responsibility which can be left to industry to fulfil. Its extent will of course depend on the harmfulness of the activity and the foreseeability of the risk. Once the risk ought to have been foreseen as a result of an Environmental Impact Assessment (EIA) or in some other way (e.g. an official report) then the state has a duty to take appropriate action: it cannot wait until the interference with health or private life has become a reality.<sup>69</sup> In assessing whether a risk is foreseeable for this purpose it is quite likely that the precautionary principle will be relevant in situations of serious or irreversible harm, although the point has not so far been decided by the Court.<sup>70</sup> Secondly, although the Court refers to the need to balance the rights of the individual with the needs of the community as a whole, in reality the states’ failure to apply or enforce their own environmental laws

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<sup>67</sup> Taskin, 2004-X 42 Eur. Ct. H.R. 50, 1150. The Inter American Court of Human Rights has taken the same view pursuant to Article 25 of the Inter American Convention, see *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. C.H.R. (ser. C) No. 201, at ¶¶ 106-14 (2001).

<sup>68</sup> *Lopez Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1994); *Guerra*, 26 Eur. Ct. H.R. 357; *Fadeyeva*, 2005-IV 45 Eur. Ct. H.R. 10; *Öneryildiz*, 2004-XII 41 Eur. Ct. H.R. 20; Taskin, 2004-X 42 Eur. Ct. H.R. 50, 1150. See also *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 727 ¶ 47 (holding that “the State failed to put into place adequate safeguards and mechanisms, to supervise, monitor and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to Maya lands and communities.”).

<sup>69</sup> Taskin, 2004-X 42 Eur. Ct. H.R. 50, 1148; *Öneryildiz*, 2004-XII 41 Eur. Ct. H.R. 20, 359.

<sup>70</sup> Rio Declaration, *supra* note 1, at Principle 15 (stating, “the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”). Although it is far from evident that the precautionary approach as articulated here either has or could have the necessary normative character to constitute a rule of law, it has been relied on by international tribunals as a general principle, which should be taken into account when interpreting treaties. See *Southern Bluefin Tuna Cases* (N.Z. v. Japan; Aust. v. Japan) (Provisional Measures), 38 I.L.M. 1624, 1634 (1999); see also *Id.* (separate opinions by Judge Laing at 1641; Judge Treves at 1645)); see also Andre Nollkaemper, *What You Risk Reveals What You Value*, in *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 80 (David Freestone & Ellen Hey eds., 1996).

in each of these cases left no room for such a defence. This breach of domestic law necessarily constitutes a violation of the Convention.<sup>71</sup> States cannot expect to persuade the European Court that the needs of the community can best be met in such cases by not enforcing the law. A fortiori, if a national supreme court has weighed the rights involved and annulled a permit for a harmful activity on the ground that it does not serve the public interest, the European Court is not going to reverse this judgment in favour of a national government.<sup>72</sup> Thirdly, the beneficiaries of this duty to regulate and control sources of environmental harm are not the community at large, still less the environment per se, but only those individuals whose rights will be affected by any failure to act. The duty is not one of protecting the environment, but one of protecting humans from significantly harmful environmental impacts.<sup>73</sup>

## 2.2 *Access to and Provision of Environmental Information*

Article 10 of the European Convention only guarantees freedom to receive and impart information. It creates neither a right of access to information nor a duty to communicate information.<sup>74</sup> On the other hand securing a right of access to environmental information is an important feature of contemporary European environmental law, both in EU law<sup>75</sup> and under the Aarhus Convention.<sup>76</sup>

“Environmental information” is broadly defined in the latter Convention and includes information concerning the physical elements of the environment such as water and biological diversity, as well as information about activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment, human health, safety or conditions of life. Cost benefit and other economic analyses and assumptions used in environmental decision-making are also included.

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<sup>71</sup> See, e.g., *Fadeyeva*, 2005-IV 45 Eur. Ct. H.R. 10.

<sup>72</sup> *Taskin*, 2004-X 42 Eur. Ct. H.R. 50, 1148 (holding ‘[i]n the instant case, the Court notes that the authorities’ decision to issue a permit to the Ovacik gold mine was annulled by the Supreme Administrative Court...After weighing the competing interests in the present case against each other, the latter based its decision on the applicants’ effective enjoyment of the right to life and the right to a healthy environment and concluded that the permit did not serve the public interest...In view of that conclusion, no other examination of the material aspect of the case with regard to the margin of appreciation generally allowed to the national authorities in this area is necessary.’).

<sup>73</sup> See *Kyrtatos v. Greece*, 40 Eur. Ct. H.R. 16, 399 (2003).

<sup>74</sup> *Guerra*, 26 Eur. Ct. H.R. 381.

<sup>75</sup> See e.g., Council Directive 2003/4, 2003 O.J. (L 041) (EC).

<sup>76</sup> Aarhus Convention, *supra* note 24, at art. 4, 5.

Rights of access are extended to NGOs “promoting environmental protection” in accordance with national law. There are detailed provisions, consistent for the most part with EC law, regarding access to and collection of environmental information. Access to information is also supported by the Parliamentary Assembly of the Council of Europe.<sup>77</sup>

The European Court of Human Rights has responded to these developments by ruling that information about environmental risks must be available to those likely to be affected.<sup>78</sup> In *Öneryildiz*, the Court placed “particular emphasis” on the public’s right to information about dangerous activities which posed a threat to life.<sup>79</sup> Moreover, where governments engage in dangerous activities with unknown consequences for health, such as nuclear tests, there is a duty to establish an “effective and accessible” procedure for allowing those involved to obtain relevant information.<sup>80</sup> *Guerra* shows that a failure to provide for access to information may also violate the right to private life.<sup>81</sup>

In all these situations the essential point is to enable individuals to assess the environmental risks to which they are exposed.<sup>82</sup> This right to information arises not under Article 10 of the ECHR, but under Articles 2 and 8 or Protocol No. 1 as the case may be.<sup>83</sup> It is thus the risk to life, health, private life or property which generates the requirement to provide information, not some broader concern for

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<sup>77</sup> EUR. PARL. DEB. (03) 1614 (stating, “[t]he Assembly recommends that the Governments of member States: (i) ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection; (ii) recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level; (iii) safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention...”).

<sup>78</sup> See Taskin, 2004-X 42 Eur. Ct. H.R. 50, 1148 (referring to the Aarhus Convention, Principle 10 of the Rio Declaration and the 2003 Council of Europe Recommendation).

<sup>79</sup> *Öneryildiz*, 2004-XII 41 Eur. Ct. H.R. 20.

<sup>80</sup> *McGinley & Egan v. United Kingdom*, 27 Eur. Ct. H.R. 1(1999).

<sup>81</sup> See Andre Nollkaemper, *What You Risk Reveals What You Value*, in *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 80 (David Freestone & Ellen Hey eds., 1996).

<sup>82</sup> See e.g., *McGinley & Egan*, 27 Eur. Ct. H.R. 1; See also, EUR. PARL. ASS. DEB. 55<sup>th</sup> Sess. 1614 ¶ 40 (2003).

<sup>83</sup> See European Convention on Human Rights, *supra* note 21, at § I, art. 10; See also, Protocol I to the European Convention on Human Rights (1952).

environmental governance, transparency of decision-making, or public participation. It follows that the right to environmental information in ECHR cases is more restricted than the broader requirements of the Aarhus Convention. Access to information in the latter case is not dependent on being personally affected or having some right or interest in the matter, still less does it apply only to those who are “victims of a violation” of convention rights. Everyone is entitled to environmental information covered by the Aarhus Convention.<sup>84</sup>

Despite these limitations, the ECHR jurisprudence on environmental information is in one important sense potentially more extensive than under more general access to information laws: in appropriate cases it can include a duty to inform, not simply a right of access. In *Guerra*, Italy’s failure to provide “essential information” about the severity and nature of toxic emissions from a chemical plant was held to constitute a breach of the right to private life.<sup>85</sup> The judgment notes that the applicants were “particularly exposed to danger” in the event of an accident at the factory, and there had also been a violation of Italian legislation requiring that information concerning hazardous activities be made public. Unlike other decisions this case seems to assume that the state must actively inform those affected, not merely that it must have a procedure for obtaining information if requested. This stronger formulation makes sense where the situation involves an imminent and serious risk to life or health: simply leaving it to those who may suffer injury to seek out information about such risks could not possibly fulfil the state’s duty in such cases to protect the public.<sup>86</sup> The Aarhus Convention also recognises a duty to inform, which it formulates in terms requiring an imminent threat.<sup>87</sup> Once again we can see a

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<sup>84</sup> Aarhus Convention, *supra* note 24, at art. 4(1)(a).

<sup>85</sup> *Guerra*, 26 Eur. Ct. H.R. 382.

<sup>86</sup> See *LCB v. United Kingdom*, 27 Eur. Ct. H.R. 212 (1999).

<sup>87</sup> Art. 5(1)(c) (stating, “[i]n the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority [shall be] disseminated immediately and without delay to members of the public who may be affected.”). See also the International Law Commission’s Draft Articles on the Prevention of Transboundary Harm, art. 13, Report of the International Law Commission on the work of its Fifty-third Session, Supplement No. 10 (A/56/10) [hereinafter I.L.C. Draft Articles] (stating, “[s]tates concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.”). Note that for the purposes of this provision it appears to be immaterial whether the affected public is wholly or partly located in some other state.

very close correspondence between the Court's case law and the 1998 Convention, which at the time of the *Guerra* decision was still under negotiation.

### 2.3 *Environmental protection as a legitimate aim*

Inevitably there will be circumstances where environmental objectives and the rights of particular individuals or groups may come into conflict. Establishing wildlife reserves, or regulating polluting activities, or controlling resource extraction, for example, may impair the use or value of property, hamper economic development, or restrict the right of indigenous peoples to make traditional use of natural resources. In extreme cases environmental regulation may amount to a taking of property or an interference with private and family life, entitling the owner to compensation.<sup>88</sup> Particularly in cases involving alleged interference by the state with peaceful enjoyment of possessions and property, the Strasbourg court has consistently taken the view that environmental protection is a legitimate objective of public policy. It has refused to give undue pre-eminence to property rights, despite their supposedly protected status under the First Protocol. Regulation in the public interest is not inconsistent with the terms of the protocol, provided it is authorised by law and proportionate to a legitimate aim, such as environmental protection.<sup>89</sup>

Fundamental to the Court's environmental case law is the balancing of interests that must often take place when environmental matters are involved. Obvious questions often posed in this context are whether human rights law trumps environmental law, or whether environmental rights trump the right of states to pursue economic development. Such potential conflicts have not led international courts to employ the concept of *ius cogens* or to give human rights or the right to sustainable development automatic priority. Instead, the case law has concentrated on questions of balance, necessity, and the degree of interference. It shows very clearly that few rights are ever absolute or unqualified. In consequence it has proved relatively easy for international tribunals to accommodate human rights, environmental law and

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<sup>88</sup> See *Sporrong & Lönroth v. Sweden*, 5 Eur. Ct. H.R. 35 (1982).

<sup>89</sup> *Fredin v. Sweden*, 13 Eur. Ct. H.R. 784, 792-95 (1991). See also *Mahuika v. New Zealand* CCPR/C/70/547/1993 (2000) (upholding the state's right to conserve and manage natural resources in the interests of future generations provided they did not amount to a denial of the applicant's rights.).

economic development. The ICJ's decision in the *Pulp Mills Case* illustrates the essentially relative character of these competing interests.<sup>90</sup> As the Court held there:

Whereas the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development; whereas it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; whereas from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States . . .<sup>91</sup>

The Inter-American Commission of Human Rights<sup>92</sup> and the UN Human Rights Committee<sup>93</sup> have taken a similar approach in cases concerning logging, oil extraction and mining on land belonging to indigenous peoples.

In cases before the European Court of Human Rights, states have been allowed a wide margin of appreciation to pursue environmental objectives provided they maintain a fair balance between the general interests of the community and the protection of the individual's fundamental rights.<sup>94</sup> On this basis the Court has in several cases upheld restrictions on property development.<sup>95</sup> A similarly wide

<sup>90</sup> *Pulp Mills Case* (Provisional Measures) (Arg. v. Uru.), 2006 I.C.J. 13 (July 13).

<sup>91</sup> *Id.* at 46. See also *Case Concerning the Gabčíkovo-Nagymaros Dam*, 1997 I.C.J. 7, 156 (Sept. 25).

<sup>92</sup> See *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5, rev. 1 at 727 (2004) (noting, "[t]his Commission similarly acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere. As proclaimed in the Inter-American Democratic Charter, '[t]he promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy of the states of the Hemisphere.' At the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.").

<sup>93</sup> See *Ilmari Lansman v. Finland*, United Nations Human Rights Comm., Commc'n. No. 511/92, CCPR/C/52/D/511/1992 ¶ 9.4 (1994) ("A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." The Committee concluded that Finland had taken adequate measures to minimise the impact on reindeer herding). See also *Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984 (finding that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of Article 27.).

<sup>94</sup> See *Fredin*, *supra* note 89.

<sup>95</sup> See e.g., *Pine Valley Devs. Ltd. v. Ireland*, 14 Eur. Ct. H.R. 319, 334 (1991); [Katsoulis and ors v Greece](#), Eur. Ct. H.R. (2004). *Contra* *Matos e Silva Ltd. v.*

**Deleted:** Kapsalis & Nima-Kapsali v. Greece

discretion has enabled European states to pursue economic development, provided the rights of individuals to private and family life or protection of possessions and property are sufficiently balanced against economic benefits for the community as a whole. Thus, in *Hatton v. United Kingdom*,<sup>96</sup> additional night flights at Heathrow Airport did not violate the right to private and family life because adequate measures had been taken to soundproof homes, to regulate and limit the frequency of flights and to assess the environmental impact.<sup>97</sup> Moreover there was no evidence of any fall in the value of the homes concerned, and the applicants could have moved elsewhere had they chosen to do so.<sup>98</sup> In the court's view the state would be failing in its duty to those affected if it did not regulate or mitigate environmental nuisances or environmental risk caused by such development projects,<sup>99</sup> but it is required to do so only to the extent necessary to protect life, health, enjoyment of property and family life from disproportionate interference.<sup>100</sup> The United Kingdom had acted lawfully, had done its best to mitigate the impact on the private life of those affected and, in the view of the Court, it had maintained a fair balance between the economic benefit of the community as a whole and the rights of individuals who lived near the airport.<sup>101</sup> Had the applicants demonstrated serious health effects or a risk to life the outcome might have been different: where the right to life is engaged the degree of balancing permitted will inevitably be much less.<sup>102</sup>

It should also be noted that the first instance chamber and the dissenting judges in the Grand Chamber decided in favor of the applicants on the basis that the UK had not demonstrated the value of night flights, and had neither adequately assessed the noise impact nor mitigated its effects sufficiently.<sup>103</sup> The noise nuisance

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Portugal, 24 Eur. H.R. Rep. 573 (1997) (finding restrictions on property to be unnecessary).

<sup>96</sup> *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28 (2003).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 643.

<sup>99</sup> *Id.* See also Öneriyildiz, 2004-XII 41 Eur. Ct. H.R. 20, 364; Taskin, 2004-X 42 Eur. Ct. H.R. 50, 1148.

<sup>100</sup> *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

thus constituted, in their view, a violation of the right to private life.<sup>104</sup> Clearly there can be different views on what constitutes a fair balance between economic interests and individual rights, and such a judgment is inevitably subjective. However, the Grand Chamber's approach suggests a rather greater deference towards government policy than at first instance, with inevitable consequences for environmental protection.<sup>105</sup> The important point in the present context is that the Grand Chamber leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from economic development.<sup>106</sup> On this basis, decisions about where the public interest lies are for politicians, not for the court, save in the most extreme cases. This approach cannot easily be reconciled with protecting a substantive right to a decent environment.

At the same time, the balance of interests to be maintained in such cases is not only a substantive one, but also has important procedural dimensions. Thus in *Taskin v. Turkey*, a case about the licensing of a mine, the Court held that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8."<sup>107</sup> This passage and the Court's emphasis on taking into account the views of affected individuals strongly suggests that, at least for some decisions, participation in the decision-making process by those affected will be essential for compliance with Article 8 of the European Convention on Human Rights<sup>108</sup>, as it will also for compliance with Article 6 of the Aarhus Convention.<sup>109</sup> Similarly, the right to "meaningful consultation" is upheld by the Inter

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Taskin*, 2004-X Eur. Ct. H.R. 1149.

<sup>108</sup> European Convention on Human Rights, *supra* note 21, at art. 8 (stating "Everyone has the right to respect for his private and family life, his home and his correspondence. . . . [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law.").

<sup>109</sup> Aarhus Convention, *supra* note 24, at art. 6 (stating participatory rights are available only to "the public concerned", defined in art. 2(5) as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.").



American Commission in the *Maya Indigenous Community of Toledo Case*,<sup>110</sup> and by the African commission in the *Ogoniland Case*.<sup>111</sup>

As with access to information, however, the ECHR right of participation in decision-making is not available to everyone, nor does it apply to decisions concerning the environment in general.<sup>112</sup> Only those whose rights are in some way affected will benefit from this protection.<sup>113</sup> This again is significantly narrower than under the Aarhus Convention, which extends participation rights to anyone having an “interest” in the decision, including NGOs.<sup>114</sup> If Aarhus can therefore be viewed as promoting public interest participation, the ECHR case law remains firmly grounded in individual rights. It is likely to prove much harder to influence the outcome of any balancing of interests from this perspective.

Nevertheless, the most significant feature of *Taskin* is that it envisages an informed process. The Court put the matter like this: “Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake.”<sup>115</sup> The words environmental impact assessment are not used, but in many cases that is exactly what will be necessary to give effect to the evaluation process envisaged here. This is a far-

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<sup>110</sup> *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Inter-Am. Ct. H.R., Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) ¶¶ 154-55. The Commission relies inter alia on the right to life and the right to private life, in addition to finding consultation a “fundamental component of the State’s obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied.” See also ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1991, at 1436 (1992) and the UN Human Rights Comm. decision in *Ilmari Lansman v. Finland*, CCPR/C/52/D/511/1992 ¶ 9.5, (stressing the need “to ensure the effective participation of members of minority communities in decisions which affect them.”).

<sup>111</sup> *Supra* note 13.

<sup>112</sup> It is possible, however, that art. 2(5) of the Aarhus Convention might enable NGOs to claim participatory rights under art 8 of the ECHR. *Contra* art. 8(1) of the 2003 UNECE Protocol on Strategic Environmental Assessment, under which ‘Each party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.’ The public for this purpose includes relevant NGOs.

<sup>113</sup> Aarhus Convention, *supra* note 24.

<sup>114</sup> *Id.* at art. 6.

<sup>115</sup> *Taskin*, 2004-X Eur. Ct. H.R. ¶119.

reaching conclusion, but once again, it reflects the Aarhus Convention. Article 6 of the Aarhus Convention also does not specify what kind of procedure is required, but it has detailed provisions on the information to be made available, including:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant.<sup>116</sup>

As a brief comparison with Annex II of the 1991 Espoo Convention on EIA shows, these are all matters normally included in an EIA.<sup>117</sup>

Like the *Ogoniland* and *Maya Indigenous Community* cases, *Taskin* thus suggests that what existing international law has most to offer with regard to environmental protection is the empowerment of individuals and groups most affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social and economic interests.<sup>118</sup> From this perspective, the case law espousing participatory rights for indigenous peoples appears simply as a particular manifestation of a broader principle.<sup>119</sup>

Finally, the *Taskin* judgment stipulates that “the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.”<sup>120</sup> This too reflects the requirements of the Aarhus Convention with regard to access to justice.<sup>121</sup> Following Rio Principle 10,<sup>122</sup> Article

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<sup>116</sup> Aarhus Convention, *supra* note 24, at art. 6(6).

<sup>117</sup> Convention on Environmental Impact Assessment in a Trans-boundary Context, Feb. 25, 1991, 30 I.L.M. 802, *available at* <http://www.unece.org/env/eia/eia.htm> [hereinafter Espoo Convention, at Annex II (including an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans).

<sup>118</sup> See *Taskin*, 2004-X Eur. Ct. H.R. 1148.

<sup>119</sup> See *e.g.*, *Pine Valley Devs. Ltd.*, App. No. 12742/87, Eur. Ct. H.R. ¶ 57-9 (1991); *Kapsalis & Nima-Kapsali*, Eur. Ct. H.R. (2004). *Contra* *Matos e Silva Ltd.*, 24 Eur. H.R. Rep. 573 (1997).

<sup>120</sup> *Taskin*, 2004-X Eur. Ct. H.R. ¶ 119.

<sup>121</sup> Aarhus Convention, *supra* note 24, at art. 9(2).

9 of the Aarhus Convention makes provisions for individuals to challenge breaches of national law relating to the environment when either their rights are impaired or they have a “sufficient interest.”<sup>123</sup> Adequate, fair and effective remedies must be provided. This article looks very much like an application of the decisions in *Lopez Ostra* and *Guerra* referred to earlier.<sup>124</sup> Insofar as it empowers claimants with a “sufficient interest” to engage in public interest litigation when their own rights are not affected,<sup>125</sup> however, Article 9 of Aarhus may go beyond the requirements of Article 6(1) of the ECHR. To that extent, there is another significant difference between the two treaties.

If *Hatton* shows a reluctance on the part of the Court to grapple with the merits of a decision interfering with individual rights, *Taskin* convincingly demonstrates an unequivocal willingness to address the proper procedures for taking decisions relating to the environment in human rights terms. This is a profound extension of the scope of Article 8 of the European Convention. It goes far to translate into European human rights law the procedural requirements set out in Principle 10 of the Rio Declaration and elaborated in European environmental treaty law, despite the fact that Turkey is not a party to the Aarhus Convention. On this evidence the European Convention on Human Rights is not merely a living instrument but an exceptionally vibrant one, with a very extensive evolutionary character. At the same time, however, the broader public interest approach of the Aarhus Convention and the narrower ECHR focus on the rights of affected individuals are very evident in the case law considered above. This distinction has important implications for any debate about the need for an

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<sup>122</sup> Rio Declaration, *supra* note 1, at Principle 10.

<sup>123</sup> Aarhus Convention, *supra* note 24, at art. 9.

<sup>124</sup> *Lopez Ostra*, 20 Eur. Ct. H.R. 277; *Guerra*, 26 Eur. Ct. H.R. 357; *See also* *Zander v. Sweden*, ECHR Sers. A, No. 279B (1993). *But see* *Balmer-Schafroth v. Switzerland*, 25 Eur. Ct. H.R. 598 (1997) (the majority of the Court took a restrictive view of the applicants’ standing).

<sup>125</sup> “Sufficient interest” is not defined by the Convention but the phrase is drawn from English administrative law. *See* Chris Hilson & Ian Cram, *Judicial Review and Environmental Law - Is there a coherent view of standing?*, 16 LEGAL STUDIES 1 (1996). In its first ruling, the Aarhus Compliance Committee held that ‘Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided “with the objective of giving the public concerned wide access to justice” within the scope of the Convention.’ They are not required to establish an *actio popularis*, but they must not use national law ‘as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.’ *See* UNECE, Compliance Committee, *Bond Beter Leefmilieu Vlaanderen VZW- Findings and Recommendation with regard to compliance by Belgium* (Comm.ACCC/C/2005/11) ECE/MP.PP/C.1/2006/4/Add.2 (28 July 2006) paras. 33 - 36.

autonomous right to a decent or satisfactory environment, a question to which we return in the final section.

#### 2.4 *Trans-boundary application*

International human rights treaties generally require a state party to secure the relevant rights and freedoms for everyone within its own territory or subject to its jurisdiction.<sup>126</sup> At first sight, this may suggest that a state cannot be held responsible for violating the rights of persons in other countries, but the European Court of Human Rights has in several cases held states responsible for extra-territorial effects.<sup>127</sup> In *Cyprus v. Turkey* the Court re-affirmed that “the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.”<sup>128</sup> In this case, the question was whether the respondent state was responsible for the actions of its army of occupation in Northern Cyprus. Although the context of this and earlier cases is different from environmental disputes, they suggest that the Convention could arguably have extra-territorial application if a state's failure to control activities causing environmental harm affects life, private life or property in neighbouring countries. If states are responsible for their failure to control soldiers and judges abroad, *a fortiori* they should likewise be held responsible for a failure to control trans-boundary pollution and environmental harm emanating from industrial activities inside their own territory. These activities are within their jurisdiction in the obvious sense of being subject to their own law and administrative controls. Only the effects are extraterritorial. On this basis an application to the Inter-American Commission on Human Rights has been brought against Uruguay by a group of Argentine residents concerned about possible pollution risks from a pulp mill under construction adjacent to the River Uruguay.<sup>129</sup>

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<sup>126</sup> See European Convention on Human Rights, *supra* note 21; International Covenant on Civil and Political Rights, *supra* note 1, at art. 2.

<sup>127</sup> See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. 1, 29-30 (1995); *Drozd and Janousek v. France & Spain*, 240 Eur. Ct. H.R., 1, 29 (1992); J.G. Merrills and A.H. Robertson, *HUMAN RIGHTS IN EUROPE* 23-28 (4th ed., Juris Publishing 2001). *Contra Bankovic and Others v. Belgium*, 2002-XII Eur. Ct. H.R. 333 (holding inadmissible a trans-boundary claim brought against NATO states in respect of the bombing of Serbia).

<sup>128</sup> 2002-IV Eur. Ct. H.R. 1, 24.

<sup>129</sup> Based on author's personal knowledge. At the time of writing no decision had been taken on admissibility.

Similarly, it would not be unreasonable to expect one state to take into account trans-boundary impacts in another state when balancing the wider public interest against the possible harm to individual rights.<sup>130</sup> There is no principled basis for suggesting that the outcome of cases such as *Hatton* should depend on whether those affected by the noise are in the same country, or in other countries. From this it also follows that representations from those affected in other countries should be taken into account and given due weight.<sup>131</sup>

A further important development in trans-boundary rights is the codification by the International Law Commission of a principle of non-discrimination in Article 15 of the 2001 Articles on Prevention of Trans-boundary Harm<sup>132</sup> and Article 32 of the 1997 UN Watercourses Convention.<sup>133</sup> Equality of access to trans-boundary remedies and procedures is based on the principle of non-discrimination:<sup>134</sup> where domestic remedies are already available to deal with internal pollution or environmental problems, international or regional law can be used to ensure that the benefit of these remedies and procedures is extended to trans-boundary claimants. As defined by the Organisation for Economic Co-operation and Development (“OECD”),<sup>135</sup> equal access and non-

<sup>130</sup> See Report of the International Law Association, Committee on Transnational Enforcement of Environmental Law, ILC Draft Articles on Prevention of Transboundary Harm, note 63 above.

<sup>131</sup> Ibid. See also Article 13 of the ILC Draft Articles on Prevention of Transboundary Harm, note 63 above.

<sup>132</sup> *Id.* See also ILC Draft Articles, *supra* note 87, at art. 15 (“[A] State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.”).

<sup>133</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses art. 32, G.A. Res. 51/229, Annex, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/229 (May 21, 1997), available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_3\\_1997.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf). (“[A] watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.”).

<sup>134</sup> The Inter-American Court of Human Rights has held that “the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.” See Juridical Condition and Rights of the Undocumented Migrants, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, at 113 (Sept. 17, 2003), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

<sup>135</sup> Organisation for Economic Co-operation and Development, *Recommendations of the Council on Principles concerning Trans-frontier Pollution*, OECD Doc. C (74) 224, C (76) 55, C (77) 28 (Nov. 21, 1974), in OECD, *OECD AND THE ENVIRONMENT* (Paris, 1986), available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(74\)224](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(74)224). See generally Ernst Willheim, *Private Remedies for Trans-frontier Environmental Damage*, 7 AUSTL. Y.B. INT’L LAW 174 (1976);

discrimination should ensure that any person who has suffered trans-boundary environmental damage, or who is exposed to a significant risk of such damage, obtains at least equivalent treatment to that afforded to individuals in the country of origin. This includes the provision of and access to information concerning environmental risks; participation in hearings, preliminary enquiries and the opportunity to make objections; and resort to administrative and judicial procedures in order to prevent pollution, secure its abatement or obtain compensation. These rights of equal access are to be accorded not only to individuals affected by the risk of trans-frontier injury but also to foreign NGOs and public authorities, insofar as comparable entities possess such rights in the country of origin of the pollution.

Although the Aarhus Convention does not specifically require non-discriminatory trans-boundary application, its provisions apply in quite general terms to “the public” or “the public concerned,” without distinguishing between those inside the state and others beyond its borders. In accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties it seems quite plausible to suggest that the Aarhus Convention must be interpreted in accordance with the principle of non-discrimination.<sup>136</sup> Even if that were not the case, a more important argument is that European Convention Rights “must be secured without discrimination on any ground.”<sup>137</sup> Given that the principal elements of the Aarhus Convention have now been incorporated into the European Convention on Human Rights through case law, it follows that they too must be secured in accordance with Article 14.

To deny trans-boundary claimants the protection of the Convention when otherwise appropriate would be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents. Available national procedures would have to be exhausted before any human rights claims could be brought, but there is little point requiring that national remedies be made available to trans-boundary claimants if they cannot resort to human rights law when necessary to compel the state to enforce its own laws or to take adequate account of extra-territorial

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OECD, *LEGAL ASPECTS OF TRANS-FRONTIER POLLUTION* (Paris, 1977); Henri Smets, *Le principe de non-discrimination en matière de protection de l'environnement*, in *REVUE EUROPÉENNE DU DROIT DE L'ENVIRONNEMENT* 1 (2000).

<sup>136</sup> See Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 *Y.B. INT'L ENV'T. L.* 51, 84-85 (1997).

<sup>137</sup> European Convention on Human Rights, *supra* note 21, at art. 14; *See also id.* at Protocol 12.

effects. Given that trans-boundary claimants may have to subject themselves to the jurisdiction of the state causing the damage when seeking redress for environmental harm, it seems entirely consistent with the case-law and the “living instrument” conception of the European Convention on Human Rights to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population.<sup>138</sup>

As studies for the ILA and the Hague Conference on Private International Law<sup>139</sup> have shown, greater coherence in the public and private international law aspects is desirable if environmental rights are to be made effective across borders. Moreover, the increasing international emphasis on free movement of goods, capital and investment has not yet been matched by a willingness to address the accountability of multinational corporations for environmental and human rights abuses in developing countries. Nevertheless, cases such as *Lubbe v. Cape* indicate how national conflict of laws rules which have hitherto shielded business are beginning to yield to human rights and access to justice concerns in novel and important ways that have implications for future environmental litigation.<sup>140</sup>

### **3. Conclusions: A right to a decent or satisfactory environment?**

The case law of the ECHR clearly demonstrates how much environmental protection can be extracted from existing human rights law without creating specifically environmental rights. In particular, we can see that the convention fully guarantees everything a right to a *healthy* environment would normally be thought to cover. Secondly, through evolutionary interpretation it also guarantees the main procedural requirements of the Aarhus Convention, including in various ways the rights of access to environmental information and public participation in decision-making. In that sense environmental rights are already entrenched in European human

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<sup>138</sup> See ILA Final Report, *supra* note 130.

<sup>139</sup> Christophe Bernasconi, *Civil Liability Resulting from Trans-frontier Environmental Damage: A Case for the Hague Conference?*, 12 HAGUE Y.B. OF INT'L LAW 35 (1999).

<sup>140</sup> *Lubbe v. Cape, P.L.C.*, 1 W.L.R. 1545 (2000). But see *In re Union Carbide Corporation Gas Plant Disaster at Bhopal India*, 634 F. Supp. 842 (S.D.N.Y. 1986) (refusing to hear case on grounds of forum non conveniens although the result was a denial of justice for the plaintiffs). See generally James Fawcett, *The Impact of Article 6(1) of the ECHR on Private International Law*, 56 INT'L & COMP. L.Q. 1, 39-41 (2007).

rights law, as they are also in the African Charter and the Inter-American convention. The European, African and Inter-american precedents are clearly relevant to the interpretation of comparable rights in global human rights conventions, and Principle 10 of the Rio Declaration would also sustain reading into them the procedural requirements found in the Aarhus Convention. Judge Higgins has drawn attention to the way human rights courts ‘work consciously to co-ordinate their approaches.’<sup>141</sup> There is certainly evidence of convergence in the case-law and a cross-fertilisation of ideas between the different human right systems,<sup>142</sup> so *Taskin v. Turkey* will most probably become a significant case not merely within European human rights law but globally. Nevertheless, as Hayward points out, “Procedural rights alone do little to counterbalance the prevailing presumptions in favour of development and economic interests.”<sup>143</sup> As we have also seen, ECHR procedural rights are available only to those affected. They do not facilitate the kind of public interest activism contemplated by the Aarhus Convention.

Despite its evolutionary character, therefore, the European Convention still falls short of guaranteeing a right to a decent or satisfactory environment if that concept is understood in broader, essentially qualitative, terms unrelated to impacts on humans. It remains true, as the Court reiterated in *Kyrtatos*, that “neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such....”<sup>144</sup> This case involved the illegal draining of a wetland. Although the applicants were successful insofar as the state’s non-enforcement of a court judgment was concerned, the European Court could find no violation of their right to private life or enjoyment of property arising out of the

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<sup>141</sup> R.Higgins, *A Babel of Judicial Voices?*, 55 INT’L & COMP. L.Q.. 791, 798 (2006).

<sup>142</sup> See also the separate opinion of Judge Trindade in *Case of Caesar v. Trinidad and Tobago* (2005) IACHR Ser. C, No.123, paras 6-12: ‘The converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection, that human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character, of *ordre public*; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; that the obligations enshrined therein do have an objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.’ (para.7)

<sup>143</sup> HAYWARD, *supra* note 31.

<sup>144</sup> *Kyrtatos*, 40 Eur. Ct. H.R. ¶ 52.



destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved, although, as Judge Loucaides has argued, it would have been possible to include their surroundings within a broader interpretation of the words "home" or "private life" in Article 8 of the Convention.<sup>145</sup>

The Court's conclusion in *Kyrtatos* points to a larger issue, which goes to the heart of the problem: human rights protection benefits only the victims of a violation of convention rights. If the individual applicant's health, private life, property or civil rights are not sufficiently affected by environmental loss, then he or she has no standing to proceed. There is, as Judge Loucaides has observed, no *actio popularis* under the European convention.<sup>146</sup> The Inter American Commission on Human Rights has taken a similar view, rejecting as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve from development.<sup>147</sup> In a comparable case concerning objections to the growing of genetically modified crops the UN Human Rights Committee likewise held that "no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant."<sup>148</sup>

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<sup>145</sup> Loucaides, *Environmental Protection through the Jurisprudence of the ECHR*, 75 BRIT. Y.B. INT'L L. 249 (2004).

<sup>146</sup> *Id.*

<sup>147</sup> *Metropolitan Nature Reserve v. Panama*, Case 11.533, Inter-Am. C.H.R., Report No. 88/03, OEA/Ser.L/V/II.118, doc. 70 rev. ¶ 34 (2003) (holding "[i]t is clear from an analysis of the case reported here that Rodrigo Noriega filed a petition on behalf of the citizens of Panama alleging that the right to property of all Panamanians has been violated. He points out that those principally affected include environmental, civic and scientific groups such as the Residents of Panama, Friends of the Metropolitan Nature Reserve, the Audubon Society of Panama, United Civic Associations, and the Association for the Research and Protection of Panamanian Species. The Commission, on that basis, holds the present complaint to be inadmissible since it concerns abstract victims represented in an *actio popularis* rather than specifically identified and defined individuals. The Commission does recognize that given the nature of the complaint, the petition could hardly pinpoint a group of victims with particularity since all the citizens of Panama are described as property owners of the Metropolitan Nature Reserve. The petition is inadmissible, further, because the environmental, civic, and scientific groups considered most harmed by the alleged violations are legal entities and not natural persons, as the Convention stipulates. The Commission therefore rules that it has not the requisite competence *ratione personae* to adjudicate the present matter in accordance with jurisprudence establishing the standard of interpretation for Article 44 of the Convention as applied in the aforementioned cases.") (citations omitted).

<sup>148</sup> *Brun v. France*, Communication No. 1453/2006, U.N. Doc. CCPR/C/88/D/1453/2006, ¶ 6.3 (2006).

This approach appears to rule out public interest litigation by individuals or NGOs in environmental cases under all of the relevant human rights treaties. Even those individuals who are victims of violations cannot ask a human rights court or the UN Human Rights Committee to decide in favour of environmental protection merely because they believe that is where the public interest is best served. They can only ask it to weigh their own rights against the public interest in some other value such as trade or development. In so doing they may secure some victories for environmental protection, but these will be incidental consequences, not the result of any broader commitment to a particular kind of environment.

Should we then go the whole way and create such a right? A right to a satisfactory or decent environment would be less anthropocentric than the present law. It would benefit society as a whole, not just individual victims. It would enable litigants and NGOs to challenge environmentally destructive or unsustainable development on public interest grounds. It would give environmental concerns greater weight in competition with other rights.<sup>149</sup> At the same time, definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms. The virtue of looking at environmental protection through other human rights, such as life, private life or property, is that it focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm. This is an approach which avoids the need to define such notions as a satisfactory or decent environment, falls well within the competence of human rights courts, and involves little or no potential for conflict with international environmental institutions or treaty COPs.

What constitutes a satisfactory, decent or ecologically sound environment is bound to suffer from uncertainty. At best, it may result in cultural relativism, particularly from a North-South perspective, and lack the universal value normally thought to be inherent in human rights. Indeterminacy is an important reason, it is often argued, for not rushing to embrace new rights without considering their implications.<sup>150</sup> Moreover, there is little international consensus on the correct terminology. Even the UN Sub-Commission could not make up its mind, referring variously to the right to a "healthy

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<sup>149</sup> See generally J. Merrills, *Environmental Rights*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 666 (D.Bodansky, J.Brunnée and E.Hey eds, 2007).

<sup>150</sup> Alston, *supra* note 2; Handl, *supra* note 53.

and flourishing environment" or to a "satisfactory environment" in its report and to the right to a "secure, healthy and ecologically sound environment" in the draft principles. Other formulations are equally diverse. Principle 1 of the Stockholm Declaration talks of an "environment of a quality that permits a life of dignity and well being", while Article 24 of the African Charter on refers to a "general satisfactory environment favourable to their development". What any of these mean is largely a subjective value judgment. An option preferred by Kiss and Shelton is to accept the impossibility of defining an ideal environment in abstract terms, but to let human rights supervisory institutions and courts develop their own interpretations, as they have done for many other human rights.<sup>151</sup>

But do we want courts deciding such cases? Even if definition is possible, does it follow that international courts are the best bodies to perform this task, rather than national political institutions? Should we let judges determine whether to preserve the habitat of the lesser-spotted woodpecker or the Barton Springs Salamander instead of extending an airport or a shopping mall? Here the distinction between *Hatton* and *Taskin* is important. The first shows understandable reluctance to allow the European Court to become a forum for appeals against the policy judgments of governments, provided they do not disproportionately affect individual rights. The second shows a far greater willingness to insist that decisions are made by public authorities following proper procedures involving adequate information, public participation and access to judicial review. This is a tenable, and democratically defensible distinction, especially resonant in Western Europe and North America. One would expect most judges of the European Court of Human Rights to be comfortable with it. Whether it is equally defensible in other societies elsewhere in the world is more questionable. On the one hand, the willingness of Indian and African judges in environmental cases to go further than any European or American court is evidence of a different attitude to the relationship of government and the judiciary that is not likely to be replicated in Strasbourg, but which reflects the particular circumstances of Indian democracy or the African Charter.<sup>152</sup> Given the evidence of unsustainable use of resources it is not surprising that some decisions of the African commission and the Inter-American

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<sup>151</sup> Alexandre Kiss and Dinah Shelton, *INTERNATIONAL ENVIRONMENTAL LAW* 174-78 (2d ed. 2000); See also Dinah Shelton, *Human Rights, Environmental Rights and the Right to the Environment*, 28 STAN. J. INT'L L. 103 (1991).

<sup>152</sup> But even in India the activist role of judges has been challenged: see [Razzaque article in Fordham ELR]

commission go well beyond the more limited greening of convention rights embraced by the European Court.

If we do take the view that judges are not the right people to decide on what constitutes a decent or satisfactory environment, is there then no role for international human rights law in this debate? Here the obvious alternative is to revert to the second model of human rights law canvassed at the beginning: economic, social and cultural rights. These rights are generally concerned with encouraging governments to pursue policies which create conditions of life enabling individuals, or in some cases groups, to develop to their full potential. They are programmatic, requiring progressive realization in accordance with available resources, but nevertheless requiring states to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”<sup>153</sup> Compliance is normally monitored only by committees of independent experts,<sup>154</sup> rather than by litigation through commissions and courts. The 1966 ESCR Covenant thus lacks the individual petition procedure through which the UN Human Rights Committee supervises compliance with the Civil and Political Rights Covenant. One problem with this approach is the ‘built-in defects’ of the monitoring process, including poor reporting and excessive deference to states.<sup>155</sup> But insofar as the UN Committee on Economic, Social and Cultural Rights does have some influence over governments, and can take into account agreed environmental standards, this model at least provides a mechanism for balancing environmental concerns against competing objectives.<sup>156</sup> Another problem is the narrowness of ESCR Covenant Article 12, with its focus on health and “environmental hygiene.” A great deal obviously depends on how the right to health is interpreted and applied. According to General Comment No.14, Article 12 includes ‘the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental

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<sup>153</sup> UNCESCR, General comment No.3: The Nature of States’ Parties Obligations (1990), interpreting Article 2 of the covenant. See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* (Oxford 1995).

<sup>154</sup> See Craven, *supra* note 153, at ch. 2.

<sup>155</sup> S. Leckie, *The Committee on Economic, Social and Cultural Rights: Catalyst for change in a system needing reform*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 129 (P. Alston and J. Crawford eds, 2000).

<sup>156</sup> See Kiss & Shelton, *supra* note 151, at 173-78.

environmental conditions that directly or indirectly impact upon human health.<sup>157</sup> It is difficult to see what this adds over and above the case-law on environmental impacts on the right to life. What is needed here is a broader focus on environmental quality, which could be balanced more directly against the covenant's economic and developmental priorities.<sup>158</sup> The problems of definition and judgment would still arise but, as in environmental treaty COPs, they could more readily be handled within a process of "constructive dialogue" with governments rather than through litigation in courts.<sup>159</sup> Since political processes of this kind are inherently multilateral and normally allow for more extensive NGO participation than international courts they also have a stronger claim to greater legitimacy.

This conclusion has several consequences for a potential right to a decent or satisfactory environment. As the internationalisation of the domestic environment becomes more extensive, through policies of sustainable development, protection of biodiversity, and mitigation of climate change, the role of human rights law in democratising national decision-making processes and making them more rational, open and legitimate will become more and not less significant. Public participation, as foreseen in UNCED Agenda 21, is thus a central element in sustainable development. The incorporation of Aarhus-style procedural rights into general human rights law significantly advances this objective. So do the strong provisions on public and NGO participation adopted by European states in the 2003 Protocol on Strategic Environmental Assessment.<sup>160</sup> They take the notion of public interest participation further even than the Aarhus Convention. This approach is entirely appropriate if what constitutes sustainable development and an acceptable environment is essentially a matter for each society to determine according to its own values and choices, albeit within the confines of internationally agreed rules and policies and subject to some degree of international oversight.

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<sup>157</sup> UNCESCR, General Comment No.14: The Right to the Highest Attainable Standard of Health (2000).

<sup>158</sup> For a progressive reading which uses the right to health as a basis for promoting economic development and environmental protection, see F.M. Willis, *Economic Development, Environmental Protection and the Right to Health*, 9 GEO. INT'L ENVTL. L. REV. 195 (1996).

<sup>159</sup> On the role of conferences of the parties ('COPS'), see Jutta Brunnée, *COPing with Consent: Law-making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L. L. 1 (2002); Robin Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements*, 94 AM. J. INT'L. L. 623 (2000).

<sup>160</sup> See *supra* note 30.

What is most important then is to ensure the right processes for making this determination, both internally and internationally, rather than to define some vision of its substantive outcome. For this purpose the role of international human rights courts is important but limited to the protection of individual civil and political rights and ill-suited to broader forms of public interest litigation for which national courts are better equipped. Larger questions of economic and social welfare have been and should remain within the confines of the more political supervisory processes envisaged by the ESCR Covenant and the European Social Charter. At the substantive level, a “right” to a decent or satisfactory environment can best be envisaged within that context, but at present it remains largely absent from the relevant global and regional treaties. This is an omission which can and should be addressed if environmental considerations are to receive the weight they deserve in the balance of economic, social and cultural rights.